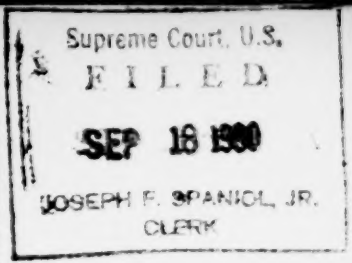


90-606



CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

ELAINE LEE,

Petitioner

v.

C. NGUYEN, A. MUHAMMUD, MS. BUSH, MS.
KAMINSKI, D. CHONG, Revenue Agents and
individually, UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ELAINE C. LEE
859 N. Hollywood Way
#137
Burbank Ca., 91505

Inpropria Persona

QUESTION PRESENTED FOR REVIEW

Does the collection of a spouse's premarital income tax debt in the community property state of California pursuant to 26 U.S.C. sections 6321 and 6331 from the other spouse's earnings, in violation of California Civil Code Section 5120.110(b), violate the nonliable spouse's substantive due process rights and equal protection rights as secured by the Constitution of the United States?

LIST OF PARTIES

The petitioner, Elaine Lee, appears in propria persona, 859 N. Hollywood Way, Burbank, Calif. 91505.

Respondent, Nguyen et. al., appears represented by James Knapp, Assistant Attorney General, Tax Division, Department of Justice, Post Office Box 502, Washington D.C. 20044

TABLE OF CONTENTS

	<u>Page</u>
Question Presented for Review	

Is the collection of a spouse's premarital income tax debt in the community property state of California pursuant to 26 U.S.C. 6331 from the other spouse's earnings in violation of California Civil Code Section 5120.110(b), violate the non-labile spouse's substantive due process rights and equal protection rights as secured by the Fifth Amendment to the United States Constitution?

Table of contents.....	i
Table of Authorities.....	ii
Petition for Writ of Certiorari.....	1
Opinion Below.....	2
Jurisdiction.....	2
Constitutional Provisions.....	3
Statement of the Case.....	5
Reasons to Grant the Writ.....	7
Conclusion.....	36
Appendix.....	37

TABLE OF AUTHORITIES

<u>FEDERAL</u>	<u>PAGE</u>
<u>Aquilino v United States,</u> 363 U.S. 509 (1960)	8,26,33
<u>Erie Railroad v Tompkins,</u> 304 U.S. 64 (1938)	31
<u>Lange v Phinney,</u> 507 F.2d 1000 (5th Cir.1975)	9
<u>Morgan v Commissioner,</u> 309 U.S. 78, (1940)	8
<u>Poe v Seaborn,</u> 282 U.S. 101 (1930)	9,32
<u>U.S. Dept. of Agriculture v Moreno,</u> 413 U.S. 528 (1973)	20
<u>United States v Bess,</u> 357 U.S. 51	8,10,32
<u>United States v National Bank of Commerce,</u> 472 U.S. 713, 722 (1985)	9
<u>United States v Mitchell,</u> 403 U.S. 190 (1971)	10
<u>U.S. Railroad Retirement Bd. v. Fritz,</u> 449 U.S. 166 (1980)	20
<u>United States v Rodgers,</u> 461 U.S. 677 (1983)	9
<u>Wissner v Wissner,</u> 338 U.S. 655 (1950)	31
<u>Zablocki v Redhail,</u> 434 U.S. 374 (1978)	24,25

<u>STATUTES</u>	<u>PAGE</u>
26 U.S.C. 6321	4,19,21,22,23,25,27
26 U.S.C. 6331	4,19,22,22,23,25,27
26 U.S.C. 6334(a)	22

STATE

<u>Addison v Addison</u> , 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965)	31
---	----

<u>In Re Marriage of Ashodian</u> , 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979)	12,13
---	-------

<u>In re Marriage Bouquet</u> , 16 Cal.3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371(1976)	31
--	----

<u>In re Marriage Fabian</u> , 41 Cal.3d 440, 224 Cal. Rptr. 333, 715 P.2d 253 (1986)	31
---	----

<u>Nevins v Nevins</u> , 129 Cal. App. 2d 154, 276 P.2d 655	14,17
--	-------

<u>Pufunder v. Goodwin</u> , 83Cal.App.511, 257 P. 119 (1927)	16
--	----

STATUTES

Cal. Civil Code Section 5110	12,13,14, 18,35
Cal. Civil Code Section 5118	11,18,19
Cal. Civil Code, Section 5110.710	11,18,19
Cal. Civil Code Section 5120.110(b)	4,6,10,12,14,15,16, 19,21,26,27,33,35

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

ELAINE C. LEE,

Petitioner

v.

C. NGUYEN, A. MUHAMMUD, MS. BUSH,
MS. KAMINSKI, D. CHONG, Revenue
agents and individually,
INTERNAL REVENUE SERVICE,
UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

Elaine Lee, Petitioner herein, prays
that a Writ of Certiorari issue to review
the judgement of the Ninth Circuit Court of
Appeal, in the cased styled "Elaine and
Richard Lee v. Nguyen, Muhammad, Bush,
Kaminski, Chong, I.R.S.; U.S.A., No. 88-
6711" opinion unpublished.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals in case styled "Elaine C. Lee v. Nguyen, Muhammud, Bush, Kaminski, Chong, I.R.S., U.S.A., No. 88-6711" the case for which certiorari is being sought, was filed on March 20, 1990 and may be found in the Appendix at page 2. Petitioner timely filed a Motion for Rehearing which was denied on June 21, 1990, App. pg. 1. Petitioner has subsequently filed a petition for Writ of Certtiorari before the 90 day limit expired.

JURISDICTION

This is an appeal from a judgement of the United States Court of Appeals for the Ninth Circuit, issued on March 20, 1990, set forth in the appendix pg. 2 and was not

published. The Ninth Circuit had Jurisdiction pursuant to 28 USC 1291. Appellant timely petitioned the Honorable Ninth Circuit for a rehearing en banc in a timely fashion and that was denied on June 21, 1990, as set forth in the appendix pg. 1. The decision of the United States District Court for the Central District of California is also set forth in the appendix pg 8 and was also unpublished. The district court had jurisdiction pursuant to 28 USC 1346(e) and 26 USC 7426. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

No person shall be...deprived of life, liberty, or property, without due process of law.

and the fourteenth amendment to the Constitution of the United States, which

provides, in pertinent part:

[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the Internal Revenue Code:

26 U.S.C. 6321 which reads as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount.... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. 6331 (b) which reads as follows:

(b) SEIZURE AND SALE OF PROPERTY.

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property.

This case also involves the following provisions of the California Civil Code Section 5120.110(b) which reads in pertinent part:

COMMUNITY PROPERTY; EARNINGS OF MARRIED PERSON:

(b) The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal.....

QUESTION PRESENTED FOR REVIEW

Does the collection of a spouse's premarital income tax debt in the community property state of California pursuant to 26 U.S.C. sections 6321 and 6331 from the other spouse's earnings, in violation of California Civil Code Section 5120.110(b), violate the nonliable spouse's substantive due process rights and equal protection rights as secured by the Constitution of the United States?

STATEMENT OF THE CASE

This is a petition for Writ of Certiorari from the Ninth Circuit Court of Appeals dismissing an action brought to stop the levy and seizure of petitioner Elaine Lee's earnings for her spouse's alleged premarital federal tax debt. The respondent IRS agents issued against petitioner Elaine Lee's earnings on September 27, 1988 a 668-W levy from which petitioner's employer, Lockheed Aircraft Corporation, seized petitioner's paycheck.

Petitioner notified each and every respondent agent that she was not the taxpayer in this instance and the levy and seizure should stop immediately. Pursuant to the letters written the respondents realized that the petitioner was in fact not the taxpayer, thereby rescinding the 668-W levy dated 09-27-88 and immediately implemented a new 668-W levy dated 10-24-88 demanding payment of the community property interest in the petitioner's earnings for the premarital tax debt of her spouse. The petitioner immediately filed suit in the Central District Court to enjoin the collection of a premarital debt from her earnings pursuant to California Civil Code Section 5120.110 (b). The District Court and subsequently the Ninth Circuit Court of Appeals declined to halt the levy and seizure of one half of appellant's earnings, totaling \$4,034.33, and hence this petition for Writ of Certiorari.

The facts leading to the initiation of

the respondents 668-W levy and seizure are brief and uncontroverted. The respondent IRS and agents alleged that the petitioner's husband, Richard Lee, owed federal taxes on taxable year 1982.

Petitioner Elaine Lee was not married to nor engaged to Richard Lee in 1982.

Petitioner's name never appeared on any demand of payment of taxes, 90 day letter, tax liens or general correspondence regarding tax year 1982 for Richard Lee until the issuance of the 668-W levy dated 09-27-88 Petitioner has no federal tax assessments against her personally.

Petitioner contends that the laws of the State of California which describe community property subject to seizure does not include the seizure of a spouse's earnings for the other spouses premarital debt, Calif. Civil Code Section 5120.110

(b).

REASONS TO GRANT THE WRIT

1. THE RESPONDENT'S APPLICATION

OF 26 U.S.C. 6331 HOLDING A NONLIABLE SPOUSE'S EARNING LIABLE FOR THE OTHER SPOUSES PREMARITAL INCOME TAX DEBT, IS A VIOLATION OF THE RIGHT TO EQUAL PROTECTION UNDER THE LAW.

State law is to govern the determination of whether a spouse is liable for a premarital debt. In Aquilino v. United States, 363 U.S. 509, 512 (1960), the court stated:

"The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had property or rights to property to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that in the application of a Federal Revenue Act, state law controls in determining the nature of the legal interest which the taxpayer had in the property ... sought to be reached by the statute."

Morgan v. Commissioner, 309 U.S. 78. Thus, ... 26 U.S.C. Section 6321 creates no property rights but merely attaches consequences, federally defined, to rights created under state law." United States v. Bess, 357 U.S. 51,55.

"Whether a taxpayer incurs a tax liability for community property income is

determined by the ownership of the income and ownership with respect to community property is determined by state law.", Poe v. Seaborn, 282 U.S. 101 (1930).

To determine whether appellant's husband does have property rights in appellant's earnings, the court must look at the definition of underlying property interests under state law, although the consequences that attach to those interests are determined by federal law, United States v. Rodgers, 461 U.S. 677 (1983); Lange v. Phinney, 507 F. 2d 1000 (5th 1975).

Once state law defines a taxpayer's interest as property or rights to property, the consequences that attach to that interest is a matter left for federal law. United States v. National Bank of Commerce, 472 U.S. @ 722; United States v. Rodgers, 461 U.S. 677 (1983). Thus, where under state law, a taxpayer has a property interest, federal law will cause the lien to attach to that interest and federal law,

not state law, will determine whether the property may be seized to satisfy the tax liability. United States v. Mitchell, 403 U.S. 190 (1971); United States v. Bess, 357 U.S. 51 (1968).

The current law governing the separate property of a spouse, i.e. earnings, for a premarital debt of the other spouse is Calif. Civil Code Section 5120.110 (b).;

The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other community property, except property insignificant in amount. As used in this subdivision "deposit account" has the meaning prescribed in Section 9105 of the Commercial Code, and "earnings" means compensation for personal services performed, whether as an employee or otherwise.

This Code Section supercedes repealed Code Section 5120 (Repealed by Stats. 1984 ch. 1671 Section 8), and was meant to expand the substance of former Section 5120 and extend it's reach to

include all debts, not just contract based debts. The intent of this section is to take the earnings of a spouse completely out of the category of community property with respect to a premarital debt.

Statutorily, the Ca. Legislature has written into the community property laws provisions whereby even though a couple is married, property otherwise classified as community property will be construed as separate property. Several examples are Ca. Civil Code (CCC) Section 5110.710, MARITAL PROPERTY-TRANSMUTATION, which provides that married persons may by agreement or transfer, with or without consideration transmute community property to separate property of either spouse, and CCC Section 5118, EARNINGS OF SEPARATED SPOUSE AS SEPARATE PROPERTY, which provides that the earnings and accumulations of a spouse and the minor children living with or in the custody of the spouse, while living separate and apart from the other

spouse are the separate property of the spouse, and CCC Section 5120.110(b), which this appellant relies on, which states, "The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. As used in this subdivision 'earnings' means compensation for personal services performed, whether as an employee or not."

When the operation of these three statutes are invoked by a specific set of facts they could be construed as being in direct conflict with the general presumption raised under CCC Section 5110 that all real or personal property acquired by either spouse after marriage is community property. In resolving which presumption is the appropriate one to use in the event of a conflict or perceived conflict appellant would call this court's attention to In Re Marriage of Ashodian, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979). Although the Ashodian case was a dissolution of

marriage and involved commingled assets it is offered to show how the court's in California have dealt with conflicting presumptions.

Ashodian was a case regarding a dissolution of marriage wherein the court found certain real and personal property to be the separate property of Mrs. Ashodian, based on the presumption and effect prior to 1975 that property acquired by a married woman by a instrument in writing is her separate property. In Ashodian the conflict was between the general presumption that all property acquired after marriage is community property and the separate property presumption given a wife's separate property in Section 5110 before 1974. In resolving this problem the court stated, "We are not faced with conflicting presumptions, because the separate property presumption in Civil Code section 5110 is an exception to the general presumption that all property acquired

after marriage is community property. Thus, where this particular separate property presumption is raised, the general community property presumption does not apply", (Nevins v. Nevins, 129 Cal. App.2d at 154, 276 P.2d 655.).

In the present case there is a specific statute, CCC section 5120.110(b) that raises a special presumption that the earnings of a married person during marriage may not be used to satisfy the premarital debt of the other spouse. This raises earnings for this purpose, to the special status of separate property of the earning spouse. Consequently, the burden of proof is on the government to rebut this presumption. The government contends that petitioner's earnings are community property because of the general presumption of community property under CCC section 5110. However, the Calif. courts have already resolved which presumption applies in the event of a conflict. In this case

the separate property presumption is statutory and accordingly should be ruled controlling. Ashodian stands for the proposition that the Calif. legislature has the right to reserve unto itself the ability to statutorily change what is or is not community property. When such exemptions are included in the code they are to be construed as special presumptions to the general community property presumption and in the event of a conflict the special presumption will be deemed controlling. The statute is not qualified as being operative only to creditors of the liable spouse. Appellant submits that the legislature intended CCC section 5120.110 (b) to be construed as bestowing on the nonliable spouse a separate property right in her earning's for the other spouse's premarital debt.

This argument can be further bolstered by looking at the Historical Notes of the 1989 pocket part of the California

Legislative Committee comments: Assembly
1984 edition, for discussions about CCC
section 5120.110(b) quoting,

"The introductory and concluding clauses of subdivision (a) are intended to negate the implications of language found in 1974 Cal. Stats. ch.1206,2609, that community property is liable only for the debts of the spouse having management and control. The introductory and concluding clauses make clear that the community property is liable for all debts of either spouse absent an express statutory exemption. Thus community property under the management and control of one spouse pursuant to section 5125(d) (spouse operating or managing business) or financial Code Section 851 (one spouse bank account) or 3051 (conservatorship) remains liable for the debts of the other spouse. For an **express statutory exception from liability of community property, see subdivision (b) (premarital debts).** (emphasis added).

The first sentence of subdivision (b) continues the substance of a portion of former section 5120 and extends it to include all debts, not just those based on contract. The second sentence codifies the rule that, for purposes of liability, earnings may not be traced through changes in form. See, e.g., Pufunder v. Goodwin, 83 Cal. App. 511, 257 P.119 (1927).

The second sentence of subdivision (b) also makes clear the extent to which payed earnings remain not liable. The effect of the

new language is to protect a deposit account only where the nonobligor spouse has an account into which only his or her earnings and separate property or property of a third person are deposited (unless the amount of other community property deposited in the account is insignificant). In such a situation, it is clear that the nonobligor spouse has carefully set aside his or her earnings and separate property and it is appropriate to continue the protection given the earnings. Where the account is commingled with any significant amount of other community property (such as the earnings of the other spouse or other community property income), the intent to segregate the earnings and separate property is not clear, and hence the protection is not continued. The same reasoning justifies not protecting the account where the obligor spouse has a right to withdraw funds from the account."

It seems obvious that the intent of CCC 5120.110(b) was to provide a separate property presumption regarding earnings of a nonliable spouse for premarital debts. To the degree that a conflict has arisen between this code section and the general community property presumption regarding earnings, the statutory separate property presumption is controlling, see Nevins v. Nevins, 129 Cal. App. 2nd. 154, 276 P.2d.

655. As such the taxpayer Richard Lee does not have a state defined property interest or right to property in my earnings regarding premarital debts.

Appellant believes that a ruling contrary to the argument herein would completely negate any statute that would dare contradict CCC section 5110. The CCC sections previously mentioned, section 5110.710, MARITAL PROPERTY TRANSMUTATION and section 5118, EARNINGS OF A SEPARATED SPOUSE, would as well be construed as state laws regulating creditors rights, having no ability to define separate property rights for federal taxing purposes. Consequently, if a husband incurs a federal tax debt while separated from his wife, the wife's earnings will become liable. This would be reasonable under the Ninth Circuit's interpretation of the California Community Property system because the marriage is still existing and all property acquired during marriage is community property. CCC

section 5118 would have no operation to protect the nonliable spouse's earnings because it could be construed as a state law that regulates creditors rights. Similarly, CCC 5110.710 could be rationalized as having no transmutation effect with regard to federal tax liens. The Ninth Circuit's decision rendered on section 5120.110(b) has such far reaching ramifications on the fabric of the California Community Property system's classification of separate versus community property that it should be reconsidered. It appears that nothing short of dissolution of marriage would effectively take a spouse's earnings, after marriage, out of the community property classification.

The operation of 26 U.S.C. 6321 and 6331 has taken on a new means of extracting money of a nonliable spouse for a premarital debt in California, to which the state legislature is inept to halt. C.C.C. 5120.110(b), it is argued, is inadequate to

protect a nonliable spouse's earnings, even though the California legislature specifically passed a statute to protect the nonliable spouse from financial ruin for a debt not personally incurred.

Petitioner argues this is a violation of the right to Equal Protection Under the Law found in the Fourteenth Amendmemnt to the United States Constitution, imputed by implication to the federal government via the Due Process Clause, Fifth Amendment to the Constitution.

The Guarantee afforded by the Equal Protection Clause is that people similiarly situated will be similiarly treated under the law, U.S. Dept. of Agriculture v. Moreno , 413 U.S. 528 (1973); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

In the present controversy, the respondent has made two classes of married couples, contrary to the statutory requirements of California. In a state

adhering to common law marriage principles a nonliable spouse could never have their earnings taken to satisfy a premarital income tax debt of the other spouse. The laws of the state are looked to to determine the property rights one spouse has in the other spouse's earnings. But, in California, a community property state, the state laws designed to protect a spouse's earnings are disregarded. The California legislature was able to see the inequitable results in the community property system of earnings being community property in all instances. C.C.C 5120.110(b) was passed to afford a nonliable community property spouse's earnings the same protections as a nonliable common law spouse's earnings. The respondent has chosen to apply 26 U.S.C. 6321 and 6331 differently in a common law state and a community property state trying to afford common law protection. Respondent has put married

couples into two distinct classes regarding earnings being levied, disregarding state substantive law. The state legislature in a community property state should have the right to pass laws allowing the married couples in that state the same rights and protections as married couples in common law states. As of now, with the respondents application of 26 U.S.C 6321 and 6331 disregarding a community property state's property rights, this equal protection has been eliminated.

In dismissing this action the District Court Judge Gray relied on 26 USC 6334(a). Quoting Judge Gray, " Federal law also provides that no property of a taxpayer is exempt unless it is mentioned in 26 USC 6334(c). And, under 6334(a), there's no mention of earnings or salary of a spouse of the taxpayer being exempt." see appendix at page 11. Petitioner finds this statement devoid of state law application. From section 6334 it appears that a

spouse's earnings may be seized to pay the other spouse's premarital debt in any state. This simply is not so. In common law states, state law is looked to to determine that the earnings of each spouse is their separate property. The liable spouse has no property interest in the nonliable spouse's earnings, even though not specifically mentioned in 6334(a) as an exemption. State law determines the property interest.

However, in a community property state, with a specific statute stating a nonliable spouse's earnings are not liable for the other spouse's premarital debt, state law does not apply for 26 USC 6334 analysis purposes. This is a double standard resulting in a violation of the Right to Equal Protection Under the Law.

2. THE RESPONDENT'S APPLICATION OF 26 U.S.C. SECTIONS 6321 AND 6331, IN THE COMMUNITY PROPERTY STATE OF CALIFORNIA, TO A NONLIABLE SPOUSE'S EARNINGS IS A VIOLATION

OF THE PETITIONERS FUNDAMENTAL RIGHT TO
MARRY AS PROTECTED BY THE DUE PROCESS
CLAUSE.

The right to marry has come before this court in the past. Marriage is considered a right protected by the implicit privacy requirements as enumerated in the Fifth Amendment. Regulations that unduly infringe on the ability to marry and have children in a legitimate surrounding have consistantly been struck down as unconstitutional.

In the case of Zablocki v. Redhail, 434 U.S. 374 (1978), a Wisconsin state law requiring state approval prior to remarriage was struck down. The state was supporting the wife and children of the plaintiff's former marriage. The law in Wisconsin would not allow remarriage unless the plaintiff was meeting the financial obligations of his former wife and children.

In striking down the state law the

court reasoned such a prohibition was a violation of the right to marry implicit in the Due Process Clause of the Constitution. The policies protected are as basic as the family unit. Children require the stability of both parents, not the stigma of illegitimacy, men and women should be able to cohabit as a legally reconized unit, enjoying the benefits of such a union.

When analyzing the application of 26 U.S.C. sections 6321 and 6331 in the community property state of California, regarding a premarital tax debt collection from a nonliable spouse's earnings, the basic policies underlying the Zablocki decision are at issue. On it's face the right to lien all property or rights to property per section 6321 and the right to levy, seize and sell any property belonging to a taxpayer per section 6331 do not appear detrimental to marriage. The analysis does not end within the four

corners of these two statutes. Statutes bearing on marriage rights within the state, that these federal collection statutes are to be implemented, must be analyzed in parallel to determine if the overriding marriage protection has been violated. State law governs the nature of the interest the taxpayer has in the property, Aquilino v United States, 363 U.S. 509, 513 (1960).

The California legislature, in Civil Code section 5120.110(b), used clear and unambiguous language to state its will regarding premarital debts and the other spouse's earnings. No exception was made for the federal government. In fact, the revision from section 5120 to 5120.110 (b) had the intention of expanding the protection afforded an innocent spouse to all debts, not just contractual debts. If the state law defines the property interest in such a way that a liable spouse has no interest in

the nonliable spouse's earnings, then implementation of 26 U.S.C. sections 6321 and 6331 on the nonliable spouse's earnings is contrary to the marriage protection. The policy of protecting and encouraging marriage is violated when marriage is the tool whereby an innocent spouse is made to pay for a debt wholly incurred by the other. This is a tremendous burden to place on marriage. Facing the denial of C.C.C. 5120.110(b) protections when 26 U.S.C. 6321, and 6331 proceedings are even a remote possibility, the informed, innocent fiance' would be insane to get married.

A ruling for the respondent would state to this petitioner and future married wage earners in similiar situations that two options are available. First the petitioner could divorce her spouse. Presumably the divorce would sever the link by which this premarital debt attaches to this petitioner. This assumption is not a

given, as the respondent could argue that this debt has vested and this petitioner is liable regardless of marriage. The second option for the petitioner is to stop working and rely on public funds. Both of these options run counterproductive to the public policy of fostering the family unit and maintaining selfsufficient, working individuals. If earnings, the labor of one's own hands, can be taken to pay another's premarital debt, there isn't anything else by which a livelihood could be made. However, the taking of earnings for this type of premarital debt is neither fair nor just and the petitioner would urge this court to reject the practice.

If the respondent were to prevail in collecting another's premarital debt from their spouse's earnings, this petitioner can visualize a flood of litigation for clarifications. Could a spouse be held liable for debts of the other spouse incurred 30 years ago? How

would the court deal with an innocent spouse who was deceived as to the debt? Would the intent of the spouses have to be analyzed to determine their state of mind at the time of marriage? Would spousal liability increase or decrease depending on the degree of reasonable premarital investigation into a potential spouse's financial background and T.R.W. report? How would prenuptial agreements affect a spouse's liability for a premarital debt? The possibilities are endless for combinations of collecting debts from innocent parties once a contractual or tort connection is made. One connection is taking it's first step here via the marriage contract. It appears the easiest way to avoid having one's own earnings seized for payment of another's independent debt is simply to not get married. The risk to reward ratio for marriage would drastically swing toward a greater risk of potential financial ruin in the event of

nondisclosure. It would appear cohabitation could offer greater protection than marriage with respect to the previous debts of either partner.

3. THE PROCEDURAL INTERPRETATION
ATTACHED TO CALIFORNIA CIVIL CODE SECTION
5120.110(b) VIOLATES THE STATE OF
CALIFORNIA'S ABILITY TO PASS SUBSTANTIVE
LAWS CONCERNING COMMUNITY PROPERTY.

Community property laws need to have the ability to change with the times. It is incumbent on the legislature of the State of California to read the needs as they arise and respond by passing statutory laws. To this end the legislature has at times had to reclassify the interest in either spouse's community property interests during the marriage. Such reclassification has led to constitutional challenges from the affected parties because of citizenship infringement or the taking of a vested right without due process of law,

see In Re Marriage of Bouquet, (1976) 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371, In Re Marriage of Fabian (1986), 41 Cal. 3d 440, 224 Cal. Rptr. 333, 715 P.2d 253, Addison v. Addison, (1965) 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897, Wissner v. Wissner (1950) 338 U.S. 655.

However, the ability and power of the legislature to pass laws affecting community property and what effect and interpretation to be given those laws was not an issue for constitutional challenge.

Although a diversity case this principle was well established in Erie Railroad v. Tompkins, 304 U.S. 64 (1938). While holding that in diversity cases the state substantive law was to be followed the court stated:

"Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common

law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of law of torts. And no clause in the constitution purports to confer such a power upon the federal courts", id.

In California the rights to property of married people are governed by the California Community Property laws. The definition of property in California is exclusively a California legislative issue. The Supreme Court of the United States recognizes the principle of state law controlling when community property interests are at stake. Erie requires that the substantive laws passed by a state legislature be followed when the rights of one of it's citizens would be affected by federal legislation. "Whether a taxpayer incurs a tax liability for community property income is determined by the ownership of the income and ownership with respect to community property is determined by state law", Poe v. Seaborn, 282 U.S.

101 (1930), see Aquilino v. United States, 363 U.S. 509 (1960), United States v. Bess, 357 U.S. 51. Petitioner would argue that the Ninth Circuit's decision rendered in this case severely restricts the State of California's ability to pass laws governing community property by placing such laws in a procedural context as opposed to construing them as substantive laws of California, requiring full force and effect except when violating constitutional due process requirements.

CCC section 5120.110(b) cannot be a clearer expression of the will of the California legislature. A spouse's earnings shall not be taken to pay the premarital debt's of the other spouse. There are no exceptions. The word "debt" in Black's Law Dictionary, 5th Edition, is defined as, "A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a broad sense any duty to respond to

another in money, labor, or service, it may even mean a moral or honorary obligation, unenforcable by legal action." This definition certainly appears broad enough to include one's debt owed to the federal government in the form of a income tax. If one entity has the ability to impose an obligation on another and force payment by any means, be that seizing property, lienning rights to property or seizing earnings at the source, this must certainly be classified as debt and its collection, especially in light of the California legislature's definition of "debt" at CCC section 5120.030, "Debt means an obligation incurred by a married person before or during marriage, whether based on contract, tort or **otherwise**." Otherwise being defined as, "In a different manner, in another way, or in other ways." With the Ninth Circuit' memorandum issued March 20, 1990, community property exceptions for federal taxing purposes, have been

reclassified. No longer are the community property exemptions substantive law of the State of California when defining community property for a taxing authorities power to take. Community property exemptions are are now state procedural matters that are preempted by federal procedural law. Appellant can see no other underlying policy for disallowing the application of CCC 5120.110(b) which on its face is clear, concise and without exception. It is for this reason appellant argues that the domain of the lawmaking ability of the State of California has been compromised. It can be argued that there are now no exceptions to the general presumption of CCC section 5110, earnings acquired during marriage are community property and further more the State of California does not possess the ability to make any changes. It appears that federal law is the sole provider of community property interpretation when the federal government has a claim to

which the definition of community property is material. Petitioner argues this is in violation of the stated law in Erie and should be reconsidered.

CONCLUSION

For the reason set forth in the petition, petitioner respectfully submits that the court should issue a writ of certiorari to the Ninth Circuit Court of Appeals in order to review the issues raised herein.

Respectfully Submitted,

September 16, 1990



Elaine C. Lee
859 N. Hollywood Way
#137
Burbank, Ca. 91505

Inpropria Persona

IN THE
SUPREME COURT OF THE UNITED STATES

ELAINE LEE,

Petitioner

v.

C. NGUYEN, A. MUHAMMUD, MS.BUSH,
MS. KAMINSKI, D. CHONG, Revenue
Agents and individually,
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

ELAINE C. LEE
859 N. Hollywood Way
#137
Burbank Ca., 91505

Inpropria Persona

TABLE OF CONTENTS

	<u>page</u>
ORDER DENYING MOTION FOR REHEARING.....	1
NINTH CIRCUIT COURT OPINION BELOW.....	2
CENTRAL DISTRICT OF CALIFORNIA OPINION AND ORDER OF DISMISSAL BELOW.....	8

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

• ELAINE C. LEE,)
Plaintiff-Appellant,) No. 88-6711
and) D.C. No. CV-88-
RICHARD A. LEE,) 6527-WPG
Plaintiff,)
v.) MEMORANDUM*
C. NGUYEN; A. MUHAMMUD;)
MS. BUSH; MS. KAMINSKI;) FILED
D. CHONG; INTERNAL) Jun. 21, 1990
REVENUE SERVICE; UNITED) Cathy A. Catterson
STATES OF AMERICA,) Clerk, U.S. Court
Defendants-Appellees) of Appeals
Before: GOODWIN, CANBY, and LEAVY,
Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELAINE C. LEE,)
) No. 88-6711
Plaintiff-Appellant,)
) D.C. No. CV-88-
 and) 6527-WPG
)
RICHARD A. LEE,)
)
)
Plaintiff,) MEMORANDUM*
)
)
 v.) FILED
)
) Mar. 20, 1990
C. NGUYEN; A. MUHAMMUD;)
MS. BUSH; MS. KAMINSKI;) Cathy A. Catterson
D. CHONG; INTERNAL) Clerk, U.S. Court
REVENUE SERVICE; UNITED) of Appeals
STATES OF AMERICA,)
)
Defendants-Appellees)

Appeal from the United States District
Court for the Central District of
California William P. Gray, District Judge,
Presiding

Submitted March 8, 1990 **
Pasadena, California

Before: GOODWIN, CANBY, and LEAVY,
Circuit Judges.

Elaine C. Lee (Lee) appeals in propria
persona from an order of the district court
denying her motion for a preliminary
injunction and dismissing her complaint

with prejudice.¹ Lee brought an action for wrongful levy against the Internal Revenue Service and certain of its agents under 26 U.S.C. section 7426(a)(1),² seeking, among other things, injunctive relief pursuant to 26 U.S.C. 7426 (b)(1).

Lee's problem arose in October of 1988 when the IRS levied on her husband's community property interest in her wages at Lockheed Corporation. The IRS levied on the wages because Lee's husband had failed to pay the taxes he owed for the tax year 1982. The amount of the levy was one half of Ms. Lee's wages.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 35(a) and Ninth Circuit Rule 34-4.

1 This court has held that "[o]rdinarily the dismissal of a complaint without the dismissal of the underlying

Lee states that she was not married to Mr. Lee in 1982. She contends that California law prohibits the IRS from collecting her earnings to satisfy a premarital debt of her spouse. She cites California Civil Code section 5120.110(b),

action is not considered an appealable final order under 28 U.S.C. section 1291." Partington v. Gedan, 880 F.2d 116, 120 (9th Cir. 1989). However, the dismissal of a complaint may be considered final and appealable if there," are special circumstances which make it clear that a court determined that the action could not be saved by any amendment of the complaint." Scott v. Eversole Mortuary, 522 F.2d 1110, 1112 (9th Cir. 1975) (quoting Jackson v. Nelson, 405 F.2d 872, 873 (9th Cir. 1968)), or "[i]f appears that the district court intended the dismissal to dispose of the action." Hoochulia v. Ariyoshi, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984).

Because it appears that the district court intended to dispose of the action, and not merely the complaint, we have jurisdiction.

2. Section 7426(a)(1) states:

Wrongful levy... If a levy has been made on property or property has been sold pursuant to a levy, any person (other

which provides in part; "The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage."

Lee is mistaken in her arguments. Section 6321 of the Internal Revenue Code provides that the amount of the delinquent taxpayer's liability " shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C section 6321; United States v. Overman, 424 F.2d 1142,1144 (9th Cir. 1970); see also 26 U.S.C. section 6331(a) (provides for a levy "upon all property and rights to property"). The IRS looks to state law only to ascertain whether the taxpayer's interest is

than the person against whom is assessed the tax out of which such levy arose) who claims an intrest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

"property" or "rights to property". Id. (citing Aquilino v. United States, 363 U.S. 509 (1960); United States v. Bess, 357 U.S. 51 (1957)). Beyond that, "once it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative, and the tax consequences thenceforth are dictated by federal law.". United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985) (quoting Bess, 357 U.S. at 55).

Therefore, state law that regulates creditor's rights, such as Cal. Civ. Code 5120.110(b), does not apply to the United States "because the United States has not looked to state law to decide how to enforce federal tax liens." Id. at 1146 (citing Aquilino, 363 U.S. at 512-14).

California law provides that the appellant's wages are the community property of the marriage. Cal. Civ. Code section 5110 (West 1990). Therefore, Mr.

Lee has a property interest in his wife's wages and they are a proper object of an IRS levy.

Lee also contends her due process rights have been violated because she was not allowed to challenge the IRS's action. However, third parties are not entitled to contest the merits of a tax assessment. Only the taxpayer may do so. Al-Kim, Inc. v. United States, 619 F.2d 576, 579 (9th Cir. 1979).

The district court correctly denied the request for a preliminary injunction and dismissed the complaint.

AFFIRMED

NOT FOR PUBLICATION

HONORABLE WILLIAM P. GRAY, JUDGE, PRESIDING.

Thursday, November 17, 1988
10:00 A.M.

LOS ANGELES, CALIFORNIA

• 8

THE COURT: Good morning.

There is no doubt about his courtroom being large enough pertaining to this matter. This is a historic occasion. This is the first time that I would have sat on the bench in the Pasadena Courthouse which is now my new domain. Would you call the case, please.

THE CLERK: Item 1, CV88-6527, Elaine C. Lee, et al, v. C. Nguyen, et al. Counsel, your appearances please.

MR. KAPLAN: Good Morning, your Honor, I'm Jeffery Kaplan, with the U.S. Attorney's office, on behalf of the United States.

MS. LEE: Elaine Lee, plaintiff.

MR. LEE: Richard Lee, your Honor.

THE COURT: Alright. Let me tell you what I think about this matter after having read this memorandum. There's no doubt that one half of the salary of Mrs. Lee since the marriage is that of Mr. Lee, because her salary is a community property.

And, there's no doubt that his half is the half that was levied upon. I'm mindful that Civil Code Section 5120.110 says that California Law, under California law, the salary of a spouse cannot be levied upon for the debt of the other spouse. And such spouse remains not liable so long as the money is held in a deposit account which the person's spouse has no right of withdrawl. And I would assume that the application of California law would exempt the seized property from such a levy.

However, it seems to me to be equally true that federal law governs whether or not property of a taxpayer which this is, is exempt. That's the case of United States against Oberman. In Washington, community property was levied upon, I think it was a house. The state law provides that the interest of -- under certain circumstances the interest of one's spouse cannot be levied upon as far as the community property is concerned. But the

Oberman case held that federal law governs whether or not property of a taxpayer may be exempt.

And, federal law also provides that no property of a taxpayer is exempt unless it is mentioned in 26 U.S.C. Section 334(a). That is Section (c)--subsection(c) says that. And under 6334(a), theres no mention of earnings or salary of a spouse of a taxpayer being exempt. So my tentative view subject to arguement is that this property that was seized is -- as far as I can tell was property seized and I'm disposed not to grant a preliminary injunction. I guess, the plaintiffs are up.

MR. LEE: Thank you, your Honor.

THE COURT: Well, now, we may have something of a problem here. You're a plaintiff. All right. You may argue.

MR. LEE: Yeah, right now, I am. First I'd like to thank you your Honor for

your consideration you've given my wife and
I --

THE COURT: That's my job.

MR. LEE: The other thing I would like to address is portions of the rebuttal that was given to me that I received yesterday. I'd like to ask the court to strike from the record the portions in here on Page 2, beginning with the line through line 16. Specifically, there's a note beginning at line 1 -- 2, it says, "Internal Revenue Service attempted to contact Mr. Lee, but received no response regarding my 1982 taxes.

This file your Honor, is nothing but 1982 correspondence. I received letters I answered every one of them. Not only that, but I have Freedom of Information Act request that never got answered. So I think that's false and I think that should not be there. The other thing is regarding '83, '84, '85, '86, '87, that's not before

the court. That's not an issue here.

THE COURT: I quite agree. I'm not concerned with your prior relationship with the Internal Revenue Service. I'm basing - I'm suppose to base my opinion on the analysis that I just put forward.

MR. LEE: Thank you, your Honor.

The other thing that bothered me in here was that where they quoted 26 USC, Section 704.1, and what they have here is fine, but they don't list the exceptions. It says, except provided in Sections and one of those is 704.6(a).

THE COURT: What does that say?

MR. LEE: Section 704.6(a), says, "action permitted under wrongful levy." And it says, if a levy has been made on property or the property has been sold pursuant to a levy, any person other than the person against whom is assessed the tax out of which a levy arose who claims an interest in or lein on such property, and

that such property was fully levied may bring such a civil action. And, my contention is, your Honor, that based on -- and I went through this before and it's stated in my paperwork, that under California Code, I don't have a property interest -- community property interest in my wife's earnings for a premarital debt.

And thats the contention my paperwork laid out. And I know that state law states whether or not I have a property interest or property in my wife's earnings. Thats what governs. And right now I can't see that. I can't see that I have that.

THE COURT: You own one-half of your wife's earnings. That's what community property is all about.

MR. LEE: Right. But in 1982 we weren't married. We have no community property.

THE COURT: But I don't know of any law that says that your property cannot be

levied upon for an earlier debt, even though the property that is levied upon is community property.

MR. LEE: Okay. The only other case - there is one other case that I did want to bring to your attention, your honor, If I may.

THE COURT: All right, please.

MR. LEE: This is a case, a Ninth Circuit case, decided May 5, 1987. And its United States versus I.T.T. Consumer Financial Corporation. The issue before the Court in this particular case was whether or not the earnings of the spouse could be obligated to pay a future debt. So the government argues that because only one person was required to sign, they were arguing that that person could make the community property future earnings of the spouse bound, and the Ninth Circuit decided that's not the case. What they stated was that you need both of the spouses to sign

because some point in time that property could not be community property.

THE COURT:

MR. LEE: Okay. Well, the anaysis I wanted to bring was, why doesn't that apply to earnings prior to a marriage. If you can say that for earnings previous -- after a marriage, I don't see why you can't say that you have to have either an agreement or there is no community property.

THE COURT: Because , there's no doubt that the property levied upon was community. And with respect to a future debt as you say, it may very well be at the time when the time comes to pay that future obligation the other party may not be married or may not be community property.

MR. LEE: Okay. Very good.

THE COURT: All right.

MR. LEE: That concludes what I have, your Honor. I thank you very much.

THE COURT: The request for preliminary injunction will be denied. I

would think if the parties want to appeal it, I would think that it would be proper to render a final judgment.

MR. LEE: I will appeal. I have notice of appeal that I'd like to process today.

THE COURT: The Court denies the request of relief in this case and determines to dismiss the case and thus making it an appealable order.

Will you prepare a proper order and judgment, please.

MR. KAPLAN: Yes, your Honor.

I just wanted to clarify that although he had filed a complaint along with the request for injunctive relief he filed a complaint. So what your saying is both the complaint -- is dismiss the complaint.

THE COURT: Yes.

All right.

(WHEREUPON, THE
PROCEEDINGS WAS ADJOURNED.)

Robert C. Bonner
United States Attorney
MASON C. LEWIS
Assistant United States Attorney
Chief, Tax Division
Jeffery N. Kaplan
Assistant United States Attorney
300 North Los Angeles Street Room 2315
Los Angeles , California 90012
Telephone; 213-894-2455

Attorneys for the United States of Amercia

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY, JUDGE, PRESIDING

ELAINE C. LEE,)
)
Plaintiff)
) D.C. No. CV-88-
) 6527-WPG
)
)
vs.)
) ORDER OF DISMISSAL
C. NGUYEN; A. MUHAMMUD;)
MS. BUSH; MS. KAMINSKI;) LODGED; Nov. 18,
D. CHONG; INTERNAL) 1988
REVENUE SERVICE; UNITED)
STATES OF AMERICA,)
) ENTERED, CLERK,
Defendants) U.S. DISTRICT COURT
) NOV. 25, 1988

Plaintiff's request for a preliminary
injunction came on for hearing before the

court, the Honorable William P. Gray, United States District Judge, presiding on November 17, 1988. Plaintiffs Richard A. Lee and Elaine C. Lee represented themselves, in pro per. Defendants, C. Nguyen, A. Muhammed, Ms. Bush, Ms. Kaminski, D. Chong, Internal Revenue Service and the United States of Amercia were represented by Robert C. Bonner, United States Attorney for the Central District of California, Mason C Lewis, Assistant United States Attorney, Chief Tax Division, and Jeffery N. Kaplan, Assistant United States Attorney, with an appearance by assistant United States Attorney, Jeffery N Kaplan. Based on plaintiffs moving papers, defendants response thereto, the oral arguement by Richard A. Lee for the plaintiffs in response to the Court's oral ruling on November 17, 1988, and all other matters properly a part of the record, AND GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that the plaintiffs

motion for preliminary injunction is denied, and that plaintiffs complaint is hereby dismissed with prejudice.

DATED; November 22, 1988

William P. Gray

United States District Judge

Presented by;

Robert C. Bonner
United States Attorney
Mason C. Lewis
Assistant United States Attorney
Chief, Tax Division
Jeffery N. Kaplan
Assistant United States Attorney